IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1412 of 1993

with

CRIMINAL APPEAL No 186 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BALU SUKHA VAGHRI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1412 of 1993
   MR CH VORA for Petitioner
   MR KG SHETH, ADDL.PUBLIC PROSECUTOR for Respondent
2. Criminal Appeal No. 186 of 1994
   MR.KG SHETH ADDL.PUBLIC PROSECUTOR for Petitioner
   MR CH VORA for Respondent as Amicus Curiae.

CORAM : MR.JUSTICE R.K.ABICHANDANI

and

MR.JUSTICE SHARAD D.DAVE

Date of decision: 09/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE SHARAD D.DAVE)

1. The appellant/original accused of Sessions Case no. 37 of 1991 has preferred this appeal against the judgment and order of the learned Additional Sessions Judge, Bhuj dated 15.12.1993, by which the appellant has been convicted under Section 366 and 376 of the Indian Penal Code and is sentenced to undergo rigorous imprisonment for five years and a fine of Rs.3,000/-, in default to undergo simple imprisonment for six months. No separate sentence was awarded to the appellant for the offence under Sec. 366 of the Indian Penal Code. The Criminal Appeal No. 186 of 1994 has been preferred by the State seeking enhancement of the sentence imposed on the accused.

2. In this appeal,the learned Counsel Mr. C.H.Vora had filed his appearance for the accused-appellant in Criminal Appeal No. 1412 of 1993 on his own, while in Criminal Appeal No. 186 of 1994 (State Appeal for enhancement), he has been appointed by us as Amicus Curiae to defend the accused.

3. It is the prosecution case that the complainant along with his wife went for selling vegetables at about 5.00 p.m. on 29th January, 1993 and when they returned around 9.30 p.m., their son Ashok informed them that his sister Madhu came home crying and told him that Balu Vaghri showed sugarcane to her and took her in his house and he mounted over her and when she started screaming, he left her. On enquiry by the complainant, the prosecutrix Madhu repeated the same history. On this, the complainant and his wife along with Madhu, went to the house of Balu Vaghri and on seeing Balu Vaghri, Madhu screamed that he was the person who showed her Sugarcane and climbed on her.

4. It is the say of the prosecution that based on the complaint of the father of the victim, a case was registered against Balu Vaghri and the victim Madhu was sent for medical examination. The police to whom the investigation was handed over, recorded the statements of various witnesses, prepared the panchanama of the scene of offence, seized the clothes of both the accused and Madhu, sent the seized articles for analysis to the F.S.L. and obtained the report. After completion of the

investigation, the chargesheet was filed against the accused in the court of Judicial Magistrate (First Class), Gandhidham, on 11.6.1991 who committed the case to the Sessions Court, Bhuj for trial.

5. The charge exh. 1 was framed against the accused on 13.10.1993 for the offences punishable under Sections 366 and 376 of the Indian Penal Code. The charge was read over and explained to the accused who pleaded not guilty and claimed to be tried. The learned trial Judge found that the age of the prosecutrix Madhu was only that of 7 years at the time of the incident. It is held by the learned trial judge that the accused had induced the victim Madhu to his house by giving her sugarcane and that the consent of a girl below the age of 16 years was of no consequence. It was held that the medical examination clearly established the fact that the minor Madhu was raped on the date of the incident. On appreciation of the oral and documentary evidence adduced by the prosecution, the learned trial Judge held that it was proved by the prosecution that the accused had committed rape on the minor Madhu and accordingly convicted the accused under Section 366 and 376 of the Indian Penal Code and sentenced him as stated above.

6. The victim Madhu was examined in the hospital by Dr.Sanjaykumar Karnidan Gadhvi P.W.12 on 30.1.1991 at about 10.00 p.m. In his deposition exh. 28, he has stated that she was about 7 years of age and there was no growth of pubic hair. The following facts were noticed on her as stated in the certificate exh. 29 issued by him :

"Examination of clothes including the underlinen worn at the time of rape does not show any blood, semen or discharge stains.

Auxiliary pubic hairs are absent.

No any injuries, marks of violence absent over breast, cheek, lips, thighs.

Examination of Genital organ :

No marks of violence over vulva.

Vagina hymen is torn and ruptured at many places.

Vaginal semen examination shows plenty of red blood cells but no spermatozoa."

In the opinion of the doctor, above findings suggested recent sexual intercourse.

6.1. Dr. Sanjaykumar Karnidan Gadhvi, in his deposition at exh. 28 has stated that the prosecutrix

was brought with the police yadi on 30.1.1991 at about 10 p.m. He examined the prosecutrix Madhu and found that there were no injuries on her lips, chest, cheeks and thighs. But her hymen was ruptured. In his opinion, the symptoms indicated a recent sexual intercourse. The doctor gave his certificate which is on record at exh. 29, which proves his deposition.

7. The panchanama of the place of scene of offence is on record at exh. 13. Babubha Keshubha and Kesha Kanji were the panchas in whose presence the panchanama was made. They, in their depositions at exhs. 12 & 18 did not support the prosecution. However, their not supporting the prosecution is not significant because nothing was seized from the place to which the panchanama relates.

8. The learned counsel for the appellant-accused submitted that the panchas except the panch Velshi Mahadev at exh. 16, have not supported the prosecution case. The prosecutrix, herself, has stated in her cross-examination that Babu Jina, who is her uncle has asked her to give the name of the present accused in the alleged crime. She, in clear terms, had stated that the accused has not done anything to her. Babu Jina, in his deposition at exh. 9 has stated that when he heard the cry of victim Madhu, he thought that somebody is beating Madhu, therefore neglected her cry and when he returned from the market, he came to know about the incident. The house of Babu Jina is in between the house of the present accused and the victim. The deposition of the child witness Ashok Babu at exh. 7 failed to support the prosecution case. The medical report of the victim Madhu as well as the accused does not show any part played by the accused in the alleged crime. Therefore, the prosecution has failed to prove the alleged rape committed by the accused on the victim Madhu. Earlier the police had registered the complaint for the offence under Sec. 354 of the Indian Penal Code and after twelve days, at the instance of the victim and her parents, registered the complaint for an offence under Sec. 376 of the Indian Penal Code against the accused. Therefore, this is a fit case wherein the punishment inflicted on the accused deserves to be set aside. So far as the enhancement appeal is concerned, the learned counsel for the defence submitted that when the prosecution has failed to prove the case against the accused, the question of enhancement of sentence imposed does not survive. Therefore, the State appeal deserves to be dismissed.

9. The learned A.P.P. for the state has submitted that from the deposition on record, it is clearly established that taking disadvantage of the absence of the parents of the prosecutrix, the accused by showing sugarcane, induced the minor girl to enter the hut of the accused where, as per the say of the prosecutrix, she was raped. The minor girl was just seven years old and could not do anything. However, when her parents came, her brother Ashok disclosed the story. Even if there may be some discrepancy in the deposition of the victim and no blood marks or semen was found on the clothes of the victim or that she was not having any injury on her body, that would not absolve the accused from the crime that he has committed. The learned counsel for the state submitted that if the complaint is given within 25 hours from the time of the incident, it cannot be said that there was delay in filing of the complaint in view of the fact that the victim and her parents are illiterate and would not blindly rush to the police for filing the complaint against the neighbour wherein their minor girl is involved. The prosecution, according to him, has proved the charge against the accused beyond any reasonable doubt and the accused is rightly convicted by the trial Judge.

9.1. While arguing the enhancement appeal, (Criminal Appeal No. 186 of 1994) the learned A.P.P. for the State submitted that such serious offences are taking place frequently in the society and in such type of offence wherein the victim is of tender age, to set an example in the society, maximum sentence should be awarded to such accused who can be said to be a menace to the society.

10. The prosecutrix Madhu has stated in her deposition at exh. 8 that the accused Balu had shown her a sugarcane and taken her in his house. After that he removed her underwear and he raped her in his house. She had returned to her house crying. When she came, her brother asked her to put the bedding. She identified the accused as the person who raped her. She stated in her cross-examination that at the time when Balu gave her sugarcane he had not done anything. She has denied the suggestion that she did not know Balu Sukha.

10.1. It is established that the victim was seven years of age. Ashok, her elder brother in his deposition exh. 7 supports her version that she had come out of the house of the accused weeping and told him that he had mounted on her. Ashok told this story to his parents. Ashok, at the time of giving deposition was about 13 years and he

knew the sanctity of oath. There was no reason for Ashok to give false name of the accused who was their neighbour. In our opinion, the medical certificate exh. 29 issued by the Medical Officer clearly corroborates the prosecutrix about her being subjected to sexual intercourse by the accused. A girl aged seven years, would not ordinarily know the meaning of sexual intercourse and when she stated that accused had mounted over her, she meant that he had sexual intercourse with her as stated by her in her deposition. We uphold the finding of the trial court that this girl was raped by the accused.

11. We may note here the decision of the Apex Court in State of Maharashtra V/S Chandraprakash Kewalchand Jain reported in AIR 1990 S.C.658, the Hon'ble Supreme Court has held that "the prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of a crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Sec. 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to S. 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice."

12. For the foregoing reasons, we find ourselves in complete agreement with the reasoning and findings of the learned trial Judge who has rightly convicted the accused for the offences under Secs. 366 and 376 of the Indian Penal Code. We find that in the facts and circumstances of the case the sentence imposed on the accused by the learned trial Judge is not required to be enhanced. The sentence awarded to the accused cannot be said to be unduly lenient and we find no reason to enhance it.

Both the appeals are therefore dismissed.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

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